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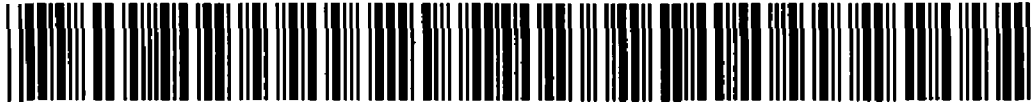
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REPLY BRIEF (P)

SUPREME COURT OF KENTUCKY

FILE NO. 75-638

CLAY PEARSON and
EDNA T. PEARSON, his wife

APPELLANTS

V.

JEAN HAMILTON

APPELLEE

APPEAL FROM THE MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE

RESPONSE TO PETITION FOR REHEARING

FILED

JOHN D. SWORD
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Richmond, Kentucky 40475

MARTHA LAYNE COLLINGS
CLERK
SUPREME COURT

ATTORNEYS FOR APPELLEE

This is to certify that a true copy of this response has been served upon
Hon. Thomas D. Shumate, attorney for the appellants, Shumate, Shumate &
Flaherty, 221 West Irvine Street, Richmond, Kentucky, 40475, and Hon. James
S. Chenault, Judge of the Madison Circuit Court, Richmond, Kentucky, 40475,
this 3rd day of July, 1976.

John D. Sword
ATTORNEY FOR APPELLEE

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**STATEMENT OF THE
QUESTIONS PRESENTED**

1. **WHETHER THE TRIAL COURT ERRED IN EXERCISING ITS SOUND DISCRETION TO VIEW THE PREMISES IN DISPUTE IN A CASE BEFORE IT IN ORDER TO EXPLAIN AND CLARIFY THE EVIDENCE.**
2. **DID THE COURT BELOW ERR IN CONSIDERING ON A MOTION FOR A SUMMARY JUDGMENT, ALL THE EVIDENCE IN THE RECORD BEFORE IT AS EXPLAINED AND CLARIFIED BY THE COURTS VIEW OF THE PREMISES?**

SUPREME COURT OF KENTUCKY

FILE NO. 75-638

**CLAY PEARSON and
EDNA T. PEARSON, his wife ----- APPELLANTS**

V.

JEAN HAMILTON ----- APPELLEE

**APPEAL FROM THE MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE**

RESPONSE TO PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

Appellee adopts and reaffirms the counterstatement of the case as contained in their original brief herein.

ARGUMENT

- 1. THE VIEWING BY THE COURT BELOW OF THE PREMISES IN DISPUTE WAS WITHIN THE SOUND DISCRETION OF THE COURT AND THE FACTS OBSERVED WERE PROPERLY USED IN REACHING THE DECISION RENDERED BY THE COURT.**

Appellants primary barrage in their Petition for Rehearing is directed, as it was in their original argu-

ment to this Court, at the viewing of the premises in dispute by the trial court. As this court pointed out, the trial judge sitting without a jury should be extended the same privilege of viewing the premises as is granted a jury, K.R.S. 29.301. It is within the sound discretion of the Court sitting as a trier of fact to view the locality whereat matters in dispute before the Court are located, *Wilcox v. Lee*, 264 Ky. 65, 94 SW2d 294.

With the right to view the premises established the question then becomes whether or not the Court is required to ignore what it has seen. Many jurisdictions permit the trial court to use the information obtained by viewing the premises as direct evidence in the case to be used as any other evidence would be used in reaching a decision. 76 Am Jur 2d, Sec. 1247. Appellants again rely on the case of *Owens v. Talbot*, 262 Ky. 550, 90 SW2d, 723. However, as was pointed out in *Fitzhugh v. L & N Railroad Company*, 300 Ky. 509, 189 SW2d 592, 593 (1945), the problem in *Owens* was the fact that the trial court had not set out the facts obtained from its view of the scene and so a review of its findings by this Court was impossible. In the case at bar the trial court's observations are set forth at great length in its Memorandum Opinion and Judgment, (TR. 86). In any event these facts as set out are correlated with and wholly substantiate the expert testimony adduced and clarify and explain that testimony and so there is no conflict with *Owens* in this Court's affirmance of the Madison Circuit Court, *Justice v. Blackburn*, 300 Ky. 51, 189 (1955). The trial court did not base its decision upon the results of its visit alone but on the expert testimony in the light

shed upon it by the viewing. The findings of the Court are clearly based on and supported by the evidence before that Court and so may not be overturned, CR 52.01: *Dalton v. Mullins*, Ky. 293, SW2d 470.

Whether or not the Court's visit was had after notice to or with consent of the parties is of no consequence in this case as there is no showing or allegation that the facts as observed and detailed by the Court were erroneous or that different or additional facts which would have affected the outcome would have been adduced if the Court were accompanied by counsel. Absent such, no prejudice has resulted to Appellants and notice or lack of notice is therefore immaterial, *Kentucky Lake Vacation Land, Inc. v. State Property and Building Commission*, Ky., 333 SW2d 779.

II. THE ITEMS SET FORTH IN CR. 56.03 ARE NOT AN EXCLUSIVE LISTING OF MATTERS TO BE CONSIDERED IN RULING ON A MOTION FOR A SUMMARY JUDGMENT AND SO THE COURT BELOW PROPERLY CONSIDERED THE RESULTS OF ITS VIEWING OF THE PREMISES.

CR 56.03 sets forth certain items to be considered by the trial court on hearing a motion for a summary judgment. Appellants contend that this listing is exclusive. That is, however, not the case. The "laundry list" contained in CR 56.03 is merely illustrative of the matters which may be considered and the actual scope of evidence considered in any particular case is dependant upon the facts of that case and the discretion of the court. 7 Clay, Ky. Prac., 3rd Ed., Civil

Rule 56.03, Comment 6, at 229. There was no error committed by the court below in using its view of the premises to explain and clarify the testimony by deposition of expert witnesses.

CONCLUSION

The decision of the Court below is fully supported by the record as a whole, and by reason and equity, and there are no grounds for this Court to disturb its opinion rendered herein.

Respectfully submitted,

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